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ANTONIO CABALLERO: CONFLICTING U.S. ANTI-TERRORISM LAW AND U.S. INTERNATIONAL BANKRUPTCY LAW

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ABSTRACT

Antonio Caballero sought retribution for his father's kidnap and murder in the way Congress has made it possible: the American Court System. Caballero obtained a default monetary judgment against Colombian guerrilla forces, but as expected in collecting against a terrorist organization, it was an uphill battle. When finding attachable assets, Caballero must act fast, but in the present case, an international bankruptcy proceeding sought to thwart his legitimate efforts to satisfy his judgment. The question is: should Caballero win in "race to the courthouse" fashion, or does the international bankruptcy stay lead to an orderly distribution of assets? This note breaks down the merits of each argument, and ultimately offers likely solutions.

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1. INTRODUCTION

Carlos Caballero was tortured daily, deprived of food and water, and held for ransom during his kidnapping ordeal with Colombian guerrilla forces.[1] Carlos Caballero, for much of his life, was a distinguished Colombian politician and outspoken critic of those Colombian guerrilla forces.[2] A five-time senator and former ambassador to the United Nations, Caballero was not just targeted for his outspoken critique of the Colombian guerrilla rebel groups but also targeted for the placement of his country farm, which would have been a prime route for drug-trafficking activities.[3] Despite being paid a "substantial sum" for his return, the guerrilla forces executed Carlos Caballero, leaving his body on the side of a dirt road.[4]

Fearing for his safety, Carlos Caballero's son, Antonio, fled his home and country, leaving his property and businesses behind.[5] Antonio was granted political asylum in the United States after Colombian police told him they could not guarantee his safety.[6] Eventually, Antonio Caballero brought suit under the Alien Tort Statute ("ATS") in Florida State Court, alleging that the Revolutionary Armed Forces of Colombia ("FARC"), the National Liberation Army ("ELN") and the Norte del Valle Cartel ("NDVC") colluded to smuggle cocaine through the Magdalena River Valley where Carlos Caballero owned land and ultimately colluded to kidnap, hold for ransom, and kill Carlos Caballero.[7] The three defendants were found guilty of racketeering, torture, and extrajudicial killing, among other crimes.[8]

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[1] Deborah Bloom, *Son of murdered Colombian diplomat gets $1 million in narco-cash,* CNN (Feb. 27, 2017, 10:02 PM), https://www.cnn.com/2017/02/27/americas/narco-cash-dead-diplomat-son/index.html.
[2] *See id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Jim Wyss, *Florida courts hand down $191 million ruling for Colombian assassination,* THE MIAMI HERALD (December 24, 2014, 5:34 PM), https://www.miamiherald.com/news/nation-world/world/americas/colombia/article4941369.html.
[7] *Id.*
[8] *Id.*

The defendants did not respond to the complaint, and Antonio Caballero was granted summary judgment.[9] Additionally, Antonio Caballero was granted a damages award in the amount of $191.4 million against FARC, ELN, and NDVC.[10] The United States government maintains that guerrilla and narco-trafficking interests are related.[11] The interrelatedness of guerrilla and narco-trafficking interests help judgment holders, like Antonio Caballero, collect on their judgments because it opens a new set of funds that can potentially be traced back to the original terrorist group. That is, if the guerrilla forces are aiding the cartel in moving illicit drugs, funds related to the cartels would be open for collection attempts by victims of terrorism, such as Caballero.

In related terrorism and drug-trafficking litigation, collecting on judgments is difficult due to the veiled and attenuated links between traceable monetary systems and the groups that are responsible for the wrongs committed against plaintiffs.[12] Another FARC judgment creditor, Thomas Howes, observed on the prospects of collecting on his judgment against FARC that the group does not have "blocked assets in the US, never has and likely never will. [Foreign terrorist organizations] simply do not open bank accounts or hold assets in their name."[13] Howes further explains: "Instead, they operate through cartels, groups, and individual drug traffickers and money launderers—the agencies or instrumentalities of FARC."[14] Antonio Caballero unearthed one such agency or instrumentality when linking Honduran banks Banco Continental and Inversiones Continental (Panama), among other Rosenthal related businesses, to FARC.[15] Caballero presented multiple professionals who "with a

[9] *Id.*
[10] Bloom, *supra* note 2.
[11] Wyss, *supra* note 7.

[12] Bloom, s*upra,* note 2 (explaining that "collecting money from a foreign terrorist organization – particularly an armed rebel group that tries to hide its money beyond the reach of US courts – is difficult especially if you're not a US citizen.").
[13] *Id.*
[14] *Id.*
[15] *See* Antonio Caballero's Motion to Transfer Venue, In re Banco Continental, No. 20-10917-RAM (S.D. Fla. Bankr. Jan. 23, 2020), ECF No. 20-5 at 23–36 [hereinafter *Motion to Transfer*].

reasonable degree of certainty" could conclude that Banco Continental was an agency or instrumentality of FARC.[16] Banco Continental was owned and operated by Jaime Rosenthal Oliva, his son Yani Benjamin Rosenthal Hidalgo, and his nephew Yankel Antonio Rosenthal Coello, and all were noted as specially designated narcotics traffickers ("SDNT").[17] Yani Rosenthal was designated an SDNT in October of 2015 under the Foreign Narcotics Kingpin Designation Act ("Kingpin Act").[18] These companies aided and abetted international narcotics traffickers, Los Cachiros, by providing money laundering services, among other services, to the cartels and their criminal organizations.[19] Los Cachiros were then linked to FARC, thus creating necessary links from FARC to Banco Continental and providing potential assets to garnish in order to satisfy the judgments.[20] The United States District Court for the District of Columbia concluded that, "for purposes of post-judgment attachment under the [Terrorism Risk Insurance Act ("TRIA")] § 201(a), these entities are agencies and instrumentalities of the FARC."[21] These are the same defendants in Antonio Caballero's garnishment action located in the U.S. District Court of South Dakota.[22] Therefore, the same inferences and conclusions about the Rosenthal banking organizations from the *Stansell* D.C. Court decision can be extended to the Garnishment Action in South Dakota.

Antonio Caballero, the *Stansell* plaintiffs, and the *Pescatore* plaintiffs are all judgment creditors of FARC seeking to satisfy judgments that add up to over $500 million.[23] The limited funds that

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[16] *Id*. Additionally, John Robert McBrien testified to his support for Caballero's original expert Bruce Bagley's contention that Banco Continental is an agent or instrumentality of FARC. *See* Antonio Caballero's Motion to Change Venue, ECF 20-6 at 2–5.

[17] Press Release, U.S. DEP'T OF THE TREAS., Treasury Sanctions Rosenthal Money Laundering Organization (Oct. 7, 2015) (https://www.treasury.gov/press-center/press-releases/Pages/jl0200.aspx).

[18] *Id.*

[19] *Stansell v. Revolutionary Armed Forces of Colombia*, No. 10-471, 2019 WL 4040680, at *5–6 (D.D.C. Aug. 26, 2019).

[20] *Id.*

[21] *Id.*

[22] *See Motion to Transfer*, *supra* note 16, at 3–4.

[23] *See Stansell v. Revolutionary Armed Forces of Colombia*, No. 8:09-cv-2308-T-26MAP, 2010 WL 11507790, at *4 (M.D. Fla. Jun. 14, 2010); *see Pescatore v. Pineda*,

can be located and legally garnished create an uphill battle for these judgment creditors. The limited pool of attachable assets that can be linked to agencies and instrumentalities of FARC create a race to find and to garnish those assets through court orders.[24] The present cases of *Caballero v. FARC* (South Dakota Garnishment Action) and *In re Banco Coninental* create an added wrinkle, as the assets that are subject to garnishment are additionally sought in a Honduran liquidation by Banco de los Trabajadores ("Bantrab") who has been appointed as the liquidating trustee by Honduran court order.[25]

The United States has divided policy interests in a case such as this. For decades the U.S. has sought to hold terrorist parties accountable for their actions against American nationals as well as those who have been forced to flee their countries due to terrorist activities.[26] The U.S. also seeks to respect international financial order by respecting international bankruptcy laws and aiding international bankruptcies that are filed in the U.S.[27] In the present case, a Honduran liquidating trustee claims rights to Banco Continental's frozen assets along with the FARC judgment creditors.[28]

This article will examine the conflicting Congressional intentions created when a foreign bankruptcy proceeding conflicts with terrorism judgment holders' collection efforts, and how this conflict is likely to play out. Do American anti-terrorism laws support a winner-take-all race to the courthouse? Is this the fairest outcome considering the potential for similarly situated victims to be left in the cold? Should an international bankruptcy proceeding thwart the legitimate effort of a victim of terrorism's collection on their judgment?

No. 08-2245, 2018 WL 5723138, at *78 (D.D.C. Nov. 1, 2018); *see also* Bloom, *supra* note 2.

[24] *See* H.R. Rep. No. 106-733, Agency Views, at 12 (2000) [hereinafter *House Report*].

[25] *See* Banco Continental Petition for Recognition of a Foreign Proceeding, *In re Banco Continental*, No. 20-10917-RAM (S.D. Fla. Bankr. Jan. 23, 2020), ECF No. 1, at 1 [hereinafter *Motion for Recognition*].

[26] *See* Stephen J. Schnably, *The Transformation of Human Rights Litigation: the Alien Tort Statute, the Anti-Terrorism Act, and JASTA,* 24 INT'L & COMP. LAW REV. 285, 334–84 (2017).

[27] *Ancillary and Other Cross-Border Cases*, ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics (last visited Feb. 10, 2021).

[28] *Motion for Recognition*, *supra* note 26, at 1.

I. THE UNITED STATES' FOCUS ON VICTIMS OF TERRORISM FINDING ACCOUNTABILITY

The United States has long been invested in combating wrongs against its citizens as well as foreign nationals. The First Congress enacted the Alien Tort Statute ("ATS") in 1789, which has seen only minor changes since its creation.[29] The ATS creates federal district court jurisdiction for torts perpetrated against a foreign national.[30] Congress has since created other laws that protect American nationals against terrorism.[31] There seems to be a consensus in the United States government and judiciary that international human rights law is "to be treated more as a policy matter than a legal commitment."[32] This United States policy is embodied in TRIA, which allows Antiterrorism Act and ATS judgment holders to attach blocked assets of agencies or instrumentalities of terrorist parties.[33]

A. History of the Alien Tort Statute

From the First Congress, the Alien Tort Statute ("ATS") was enacted to provide that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[34] For centuries, the ATS was used rarely as a jurisdictional statute, but the ATS has become a "prominent vehicle for foreign nationals to seek redress in U.S. courts for human rights offenses and acts of terrorism.[35] The ATS "was intended to promote harmony in international relations

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[29] Schnably, *supra* note 27, at 289 n.5 (explaining the ATS was "enacted as part of the Judiciary Act of 1789, and has remained essentially unchanged since then[.]").
[30] Stephen P. Mulligan, Cong. Research Serv., R44947, The Alien Tort Statute (ATS): A Primer 1 (2018), https://crsreports.congress.gov/product/pdf/R/R44947/4.
[31] *See generally* Anti-Terrorism Act, 18 U.S.C. § 2333 (2012); *see also* Terrorism Risk Insurance Act of 2002 (reauthorized on Dec. 20, 2019, through Dec. 31, 2027, as 133 Stat. 2534).
[32] Schnably, *supra* note 27, at 293.
[33] Terrorism Risk Insurance Act of 2002 § 201, 28 U.S.C. § 1610 note (2012) (Satisfaction of Judgments from Blocked Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism).
[34] Mulligan, *supra* note 31, at 1.
[35] *Id.*

by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of a remedy might provoke foreign nations to hold the United States accountable."[36]

Between 1789 and 1980, only two reported decisions invoked the ATS as a basis for jurisdiction.[37] The ATS came to the forefront when the Second Circuit issued its *Filártiga* decision, where it held that the ATS "permits claims for violations of modern international human rights law."[38] While *Filártiga* caused an influx of ATS litigation, more recent decisions have placed limits on ATS invocation.[39] *Sosa* held that the ATS allows federal courts to hear only a "narrow set" of claims for violations of international law.[40] The ATS was further narrowed in 2013 when the Supreme Court handed down its *Kiobel* decision providing that ATS does not provide jurisdiction for claims between foreign plaintiffs and defendants involving matters arising completely outside the territorial jurisdiction of the United States.[41] The petitioners claim must "touch and concern" the United States with "sufficient force" to warrant ATS application.[42] Further, in *Jesner*, the Supreme Court limited the ATS from applying to foreign corporations.[43] While the Supreme Court has limited the reach of the ATS in certain areas, one area where the ATS has increasingly been cited is litigations by U.S. victims of foreign terrorism.[44] The United States government has shown an enduring commitment to victims of terrorism having a way to hold their perpetrators accountable. There is a balance that must be struck regarding the ATS in upholding international human rights and balancing the foreign policy concerns of potentially overstepping international norms in attaching international assets.

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[36] *Id.* at 3.
[37] *Id.* at 6.
[38] *Id.* at Summary.
[39] *Id.*
[40] *Id.* at 11.
[41] *Id.* at 12.
[42] Case Comment, *Clarifying* Kiobel*'s "Tough and Concern" Test*, 130 HARV. L. REV. 1902 (May 8, 2017), https://harvardlawreview.org/2017/05/clarifying-kiobels-touch-and-concern-test/.
[43] Mulligan, *supra* note 31, at 2.
[44] Schnably, *supra* note 27, at 293.

In the case of Antonio Caballero, Caballero was able to use the ATS, as a resident alien and victim of a tort in violation of the law of nations, to hold FARC, ELN, and NDVC accountable for the atrocity that was committed against Caballero's father. The defendants in the lawsuit kept themselves absent and did not challenge Caballero's claims resulting in a default judgment.[45] This default judgment must have assets to attach, and TRIA allows the attachment of blocked assets.

B. The Antiterrorism Act

The Antiterrorism Act ("ATA"), codified as 18 U.S.C. § 2331, establishes a cause of action for any U.S. national, and only a U.S. national, who has been injured by an act of international terrorism.[46] The ATA is different from the ATS, which is a jurisdictional statute that grants the U.S. district courts jurisdiction.[47] While the ATA does establish jurisdiction in the federal courts for a claim by U.S. nationals, it also creates a cause of action, which distinguishes the ATA from the ATS.[48] International terrorism is defined as violent or dangerous acts intended to intimidate a civilian population in violation of U.S. criminal law.[49] This civil liability created by the ATA can extend to "donors and supporters of terrorism" as well as service providers such as banks that provide material support to terrorist parties.[50] In 2016 Congress expanded civil liability under the ATA to any person "knowingly or recklessly contribut[ing] material support or resources" to a person posing a "significant risk" of committing acts of terrorism pursuant to the Justice Against Sponsors of Terrorism Act ("JASTA").[51]

The ATA provides for treble damages, which helps plaintiffs attract attorneys to fight their cause, but it also is said to aid in the fight

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[45] Wyss, *supra* note 7.
[46] 18 U.S.C. § 2333(a).
[47] Alison Bitterly, *Can Banks Be Liable for Aiding and Abetting Terrorism?: A Closer Look into the Split on Secondary Liability Under the Antiterrorism Act*, 83 FORDHAM L. REV. 3389, 3398 (2015).
[48] *Id.* at 3389.
[49] Schnably, *supra* note 27, at 335.
[50] *See* Olivia G. Chalos, *Bank Liability Under the Antiterrorism Act: The Mental State Requirement Under § 2333(a),* 85 FORDHAM L. REV. 303, 324–25 (2016).
[51] *See* Schnably, *supra* note 27, at 369.

against terrorism by attacking the funding that keeps terrorist activities occurring.[52]

The *Stansell* Plaintiffs, et al. brought suit in the Middle District of Florida citing the Antiterrorism Act, 18 U.S.C. § 2333, which provides:

> (a) Action and jurisdiction.—Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.[53]

In their lawsuit the *Stansell* plaintiffs allege FARC shot down their reconnaissance aircraft, assassinated the pilot, and took the other flight members captive for five years.[54] The *Stansell* Plaintiffs established that "no sovereign immunity or act of war exceptions to the ATA apply" in that instance.[55] Again, the FARC defendants did not appear and were subject to a default judgment of $318,030,000.[56] The Court's decision ended with the explanation that "inasmuch as the FARC used profits from the manufacture and distribution of cocaine, money laundering, and extortion to support their terrorist acts, Plaintiffs [have] perfected liens on proceeds derived from these related offense criminal activities."[57]

Pescatore et al. plaintiffs also brought suit against FARC and Juvenal Ovidio Ricardo Palmera Pineda ("Simon Trinidad"), a high ranking member of FARC, under the ATA in 2008.[58] Frank Pescatore, while working as a geologist in Colombia, was kidnapped, held for

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[52] *Id.* at 336.
[53] 18 U.S.C. § 2333.
[54] Stansell v. Revolutionary Armed Forces of Colom. (FARC), No. 8:09-cv-2308-T-26MAP, 2010 WL 11507790, at *1 (M.D. Fla. Jun. 14, 2010).
[55] *Id.* at *2.
[56] *See Id.* at *2-4.
[57] *Id.* at *4.
[58] Pescatore v. Pineda, 345 F. Supp. 3d *68, *69–70 (D.D.C. 2018).

ransom, and eventually killed.[59] The perpetrators were members of FARC who had shot Mr. Pescatore upon his attempted escape.[60] In the Court's conclusion, U.S. District Judge Collyer found that, while FARC and Simon Trinidad do not exist in the same fashion they did at the time of Mr. Pescatore's kidnapping and murder, and "there is no one left to punish," the law endeavors to provide the solace that other remedies would perform by awarding monetary damages.[61] The Pescatore plaintiffs were awarded $69,000,000 after their damages were trebled.[62]

C. The Terrorism Risk Insurance Act

Beyond the terrorist attacks on the World Trade Center in 1993 and the Oklahoma City Bombing in 1995, the insurance agencies did not view terrorism as a risk that should be considered in underwriting commercial insurance policies.[63] In the aftermath of the September 11th terrorist attack, the insurance industry saw losses that were double the largest loss in history up to that point.[64] Some estimates of the losses in the September 11, 2001 terrorist attack total $47 billion in 2019 dollars.[65] The reduced availability of insurance protecting against acts of terrorism began to cause a strain on the U.S. economy.[66] This led to a change in the way the insurance industry viewed terrorism.[67] The insurance industry believed terrorism losses were unsustainable and uncertain when considering how large the risk exposure was, and therefore, decided terrorism was an uninsurable risk. The insurance industry sought federal intervention, and shortly thereafter the

[59] *Id.* at *69.
[60] *Id.* at *70.
[61] *Id.* at *78.
[62] *See id.*
[63] *Terrorism Risk Insurance Act (TRIA)*, NAT'L ASS'N OF INS. COMM'RS, https://content.naic.org/cipr_topics/topic_terrorism_risk_insurance_act_tria.htm (last updated Dec. 15, 2020) [hereinafter NAIC].
[64] Jeffrey E. Thomas, *The Terrorism Risk Insurance Act – An Industry-Government Partnership*, 38 BRIEF 24, 24 (2009).
[65] *Background on: Terrorism risk and insurance*, INS. INFO. INST. (Dec. 16, 2019), https://www.iii.org/article/background-on-terrorism-risk-and-insurance.
[66] NAIC, *supra* note 64.
[67] *See id.*

Terrorism Risk Insurance Act of 2002 was passed by Congress and signed into law by President Bush.[68]

Originally created as a temporary three-year federal program that would allow the federal government to share monetary losses with insurers due to losses from a terrorist attack, the Act has been renewed four times since.[69] The Terrorism Risk Insurance Act allows for attachment of blocked assets.[70] Under section 201 of TRIA, where a:

> person has obtained a judgment against a terrorist party on a claim based on an act of terrorism, or for which a terrorist party is not immune . . . the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.[71]

As Circuit Judge Charles R. Wilson noted in *Stansell v. Revolutionary Armed Forces of Columbia*, TRIA promotes "race to the courthouse" style proceedings due to the fact that "a number of events may occur which make satisfaction using a particular asset impossible."[72] These occurrences may be the government making the assets unreachable by "seizure or de-listing of the alleged agency or instrumentality," but also that a fellow judgment creditor may seek to satisfy their own judgment by garnishing the relevant account.[73]

As evidenced by the enacting of statutes such as the ATS, the ATA, and TRIA, the United States has shown a commitment through

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[68] *Id.*
[69] *Id.*
[70] Terrorism Risk Insurance Act of 2002 § 201, 28 U.S.C. § 1610 note (Satisfaction of Judgments from Blocked Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism).
[71] *Id.* § 201(a).
[72] *Stansell v. Revolutionary Armed Forces of Columbia*, 771 F.3d 713, 729 (11th Cir. 2014).
[73] *Id.*

Congressional action to terrorists being held accountable for the harms they commit.

It is now established that the competing default judgment plaintiffs, Caballero, the *Pescatore* plaintiffs, and the *Stansell* plaintiffs have received judgments under the ATS and ATA respectively, and they are allowed to execute on assets of agencies or instrumentalities of FARC pursuant to TRIA section 201(a).[74]

D. Further Congressional Action Showing a Policy in Favor of Anti-Terrorism Law

During the 1990s, President Clinton exercised his presidential waiver of authority conferred by section 117 of the Foreign Sovereign Immunities Act ("FSIA"), blocking default judgment holders from attaching diplomatic property and frozen assets in satisfaction of their claims against Cuba and Iran.[75] The House of Representatives sought to override this presidential waiver and allow the satisfaction of these default judgments from frozen assets of the responsible State.[76] The act was called the Justice for Victims of Terrorism Act ("JVTA"), which ultimately was not passed into law.[77] Congress was not deterred and sought further legal assistance outlined for victims of terrorism.

The Anti-Terrorism and Effective Death Penalty Act and the Flatow Amendment both signify a further push in fighting terrorism by amending the FSIA to bar sovereign immunity for state sponsors of terrorism.[78] Under the amended section 1610(a)(7) of the FSIA a foreign state's property may not be immune from execution for a judgment that was covered under section 1605(a)(7) of the FSIA.[79] The Flatow Amendment additionally allows an official or agent of a foreign state on the state sponsor of terrorism list to be liable for injury

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[74] *Id.* at 722.
[75] Jennifer K. Elsea, *Suits Against Terrorist States by Victims of Terrorism,* CONG. RESEARCH SERV. RL 31258 11–12, https://fas.org/sgp/crs/terror/RL31258.pdf (last updated Aug. 8, 2008).
[76] *Id.* at 12.
[77] *Id.*
[78] Schnably, *supra* note 27, at 344.
[79] *Id.* at 345.

to a U.S. citizen while the official or agent is acting within their scope of employment.[80]

Following these changes, Congress further amended the FSIA in 2008 through the National Defense Authorization Act.[81] In these changes, we see that Congress answered ambiguities in the 1996 FSIA amendments by "expressly creating a cause of action against foreign states for terrorism."[82] The amendment also found that property of a foreign state or an agency of a foreign state could be used to satisfy a judgment creditor's claim.[83]

E. The Office of Foreign Asset Control

The Office of Foreign Asset Control ("OFAC") is a department of the U.S. Treasury charged with enforcing economic and trade sanctions imposed by the U.S. against countries and groups of individuals.[84] Typically, OFAC's sanctions are imposed on countries and groups that are involved in foreign aggression, terrorist activities, and narcotics sales, among other acts.[85] OFAC enforces sanctions that were imposed by the U.S. government based on its foreign policy and national security objectives.[86] These policies are aimed at foreign nations, terrorists, and narcotics traffickers who pose a threat to the national security or economy of the United States.[87]

OFAC's activities are authorized by Congressional legislation, however, the president of the United States can use emergency powers to freeze foreign assets falling under U.S. jurisdiction.[88] The OFAC policies are intended to disrupt the economies and everyday activities of the groups that are involved in sanctionable activities.[89]

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[80] *Id.*
[81] *Id.* at 358–59.
[82] *Id*. at 359.
[83] *Id.*
[84] Will Kenton, Office of Foreign Assets Control, INVESTOPEDIA, https://www.investopedia.com/terms/o/ofac.asp (last updated Jan 25, 2021).
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*

In the present case, the Rosenthal family businesses (Banco Continental, Inversiones Continental (Panama), etc.) were subject to OFAC sanctions and asset freezing due to their activities in aiding and abetting narcotics trafficking into the United States.[90] As an OFAC designated SDNT, Banco Continental's assets were considered blocked for TRIA purposes.[91] OFAC grants specific licenses granting authorization to engage in a transaction that would be prohibited.[92] This license would allow the release of blocked funds.[93] Banco Continental previously had these licenses until 2017 when the last license expired.[94]

Provisions that allow the attachment of blocked assets seem to conflict with OFAC's power to block the assets of terrorists and narcotics traffickers. However, TRIA allows plaintiffs to execute judgments for compensatory damages on "blocked assets of that terrorist party" "[n]otwithstanding any other provision of law."[95] Caballero claims the notwithstanding provision is a clear statement that TRIA is "second to no law."[96] This provision, however, may not quite mean what it says. Simply citing the notwithstanding provision is insufficient to determine which of multiple statutory provisions control in certain circumstances.[97] For instance, a court held that

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[90] U.S. DEP'T OF THE TREAS., *supra* note 18.
[91] *Stansell,* 771 F.3d at 723.
[92] U.S. DEP'T OF THE TREAS., OFAC Consolidated Frequently Asked Questions, https://home.treasury.gov/policy-issues/financial-sanctions/frequently-asked-questions/ofac-consolidated-frequently-asked-questions (last visited Feb. 2, 2021) (answered in Frequently Asked Question number 7) [hereinafter *OFAC FAQ*].
[93] *Id.*
[94] *Motion for Recognition*, *supra* note 26, at 16.
[95] Mark G. Hanchet & Christopher J. Houpt, *Recent TRIA Decision Could Ease Garnishment Burden*, MAYER BROWN (Dec. 11, 2013), https://www.mayerbrown.com/en/perspectives-events/publications/2013/12/recent-tria-decision-could-ease-garnishment-burden#_ftn1.
[96] Motion to Dismiss the Complaint, or Alternatively, to Stay, and Incorporated Memorandum of Law at 5–6, Wells Fargo, N.A. v. Caballero, No. 20-cv-20868-CMA (S.D. Fla. Nov. 20, 2020), ECF No. 37.
[97] *See* Larry M. Eig, Congr. Research Serv., 97-589, *Statutory Interpretation: General Principles and Recent Trends* 39? (Sep. 24, 2014), https://fas.org/sgp/crs/misc/97-589.pdf. In *Oregon Natural Resources Council v. Thomas,* the court said, "We have repeatedly held that the phrase 'notwithstanding any other law' is not always

"directive to proceed with timber sale contracts 'notwithstanding any other provision of law' meant only 'notwithstanding any provision of *environmental* law,'" which forced the Forest Service to comply with other federal law requirements that may be conflicting.[98]

Southern District of New York courts specifically have endorsed two different readings of this "notwithstanding" provision in the TRIA collection program.[99] One S.D.N.Y. court ruled the "notwithstanding" provision applies to other relevant federal statutes or regulations rather than all law.[100] Another S.D.N.Y. court held the opposite, that the notwithstanding provision of TRIA law meant exactly what it says; that it preempts all provisions of law that may block an asset from a TRIA judgment creditor.[101] Later, in *Harrison v. Republic of Sudan*, the Second Circuit explained, "[o]nce a district court determined that blocked assets are subject to the TRIA, those funds may be distributed without a license from OFAC."[102] Therefore, it is unclear that TRIA asset collection laws supersede all law in addition to debtor bankruptcy protection.

With regards to potential de-listing of the SDNT by OFAC, the de-listing does not retroactively affect the garnishment action instituted by plaintiffs.[103] OFAC regulations delineate the result in that situation:

> Any amendment, modification, or revocation . . . of any order, regulation, ruling, instruction, or license issued by . . . [OFAC] shall not, unless otherwise specifically provided, be deemed to affect . . . any civil or criminal

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construed literally . . . and does not require the agency to disregard all otherwise applicable law." 92 F.3d 792, 796 (9th Cir. 1996).

[98] *See* EIG, *supra* note 98 (quoting Oregon Natural Resources Council, 92 F.3d at 792).

[99] Hanchet & Houpt, *supra* note 96.

[100] *Calderon-Cardona v. JPMorgan Chase Bank, N.A.,* 867 F. Supp. 2d 389 (S.D.N.Y. 2011).

[101] *Levin v. Bank of New York,* No. 09-CV-5900 RPP, 2011 WL 5312502, at *15 (S.D.N.Y. Sep. 23, 2013).

[102] *Harrison v. Republic of Sudan,* 802 F.3d 399, 409 (2d Cir. 2015) (reversed and remanded by *Republic of Sudan v. Harrison*, 139 S.Ct. 1048 (2019) on service of process grounds).

[103] *Stansell,* 771 F.3d at 732.

> suit or proceeding *commenced or pending prior to such amendment, modification or revocation*.[104]

Thus, should Mr. Caballero have seen his garnishment action to fruition, the de-listing of the SDNTs and unblocking of assets would not have affected his rights to the assets. Nonetheless, the bankruptcy proceeding filed by Banco Continental stood in the way of Caballero's garnishment proceeding.

F. The Creation of a Race to the Courthouse

The race to the courthouse is a "first to file" rule that, taken to its ultimate limit, is about filing "a fraction of a second sooner than the competition" in order to gain various advantages such as selecting a favored choice of forum.[105] In the cases where there was a race to the courthouse, certain parties had favored rights that had nothing to do with the merits of their respective cases.[106] In the Second Circuit, the first-filed rule states "where there are two competing lawsuits, the first suit should have priority, absent the showing of balance of convenience or special circumstances giving priority to the second."[107] This is not about forum shopping, but about substantially similar actions that are filed in federal court having comity amongst the courts where the first-filed action takes precedence and the second-filed action may be dismissed.[108] The rule provides that when "actions involving nearly identical parties and issues have been filed in two

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[104] *Id.* at 732–33.

[105] Marshall J. Breger, *The Race to the Courthouse is Over,* WASH. POST (Mar. 16, 1988),https://www.washingtonpost.com/archive/opinions/1988/03/16/the-race-to-the-courthouse-is-over/61d43ac6-a47c-4a20-8eda-e663db4d4076/.

[106] *Id.*

[107] *Stansell v. Revolutionary Armed Forces of Colombia,* No. 16-MC-405 ALC, 2020 WL 1158086, at *2 (S.D.N.Y. Mar. 10, 2020).

[108] John E. Goodman, *Dealing with Competing Class Actions, Part One – Race to Judgment and First-to-File Rule*, DECLASSIFIED (Oct. 10, 2017), https://www.classactiondeclassified.com/2017/10/dealing-competing-class-actions-part-one-race-judgment-first-file-rule/; *see e.g. Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.,* 342 U.S. 180 (1952).

different district courts," the court where the first suit is filed proceeds to judgment.[109]

In this case, Antonio Caballero's South Dakota Garnishment Action is the first filed action that seeks garnishment of the Wells Fargo blocked assets located in South Dakota.[110] In a faceoff between the fellow judgment creditors, Stansell and Pescatore, Caballero would have the first bite of the apple and would likely take the full amount of the Banco Continental blocked funds because the blocked funds do not come close to fully satisfying Mr. Caballero's original judgment. Often, when Congress acts to allow terrorism victims to obtain judgments against the perpetrators of their injuries, the collection efforts create a race to the courthouse by virtue of the limited pool of assets the victims are able to connect to the terrorist party.[111] This "race to the courthouse" has been an issue according to the executive office when Congress heard testimony on the efficacy of the JVTA that passed the House in 2000 but ultimately failed.[112]

Treasury Deputy Secretary Stuart E. Eizenstat testified at the House Committee on the Judiciary Subcommittee on Immigration and Claims about the Clinton Administration's views on the passing of the Justice for Victims of Terrorism Act of 2000.[113] Mr. Eizenstat recognized that, while the Administration and House shared a common goal in seeking retribution for those that are victims of terrorism, they see different ways of carrying out that end.[114] The Deputy Secretary outlined five "principal negative effects" that an act allowing victims of terrorism to satisfy judgments from a State's frozen assets would not promote fairness and U.S. interests abroad.[115] Specifically, in his third "negative effect," Deputy Secretary Eizenstat explained the executive's belief that an act like the JVTA would create a "race to the courthouse benefiting one small, though deserving, group of Americans over a far larger group of deserving

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[109] Goodman, *supra* note 109.
[110] *Motion to Transfer, supra* note 16, at 2.
[111] *See generally House Report*, *supra* note 25, at 12
[112] *Id.*
[113] *Id.* at 10–21.
[114] *Id.* at 11.
[115] *Id.* at 13–21.

Americans."[116] Eizenstat explains the executive branch's concern that the JVTA would "frustrate equity among U.S. nationals with claims against terrorism-list states."[117] He recognizes the arbitrariness of the "winner-take-all" race that would be created.[118] Therefore, the satisfaction of claims would not be based on justice or who is deserving, but based on who got in line or found assets first. He specifically cites *Alejandre*, *Flatow*, and *Anderson* cases, which brought about the JVTA, as a few of many claims brought by U.S. nationals against Cuba and Iran.[119] This recognition means that, while these are the notable cases, there are many more claims that would be left unsatisfied if only a small group is able to fully satisfy their claims. This is one example of the recognition of what happens to fellow claimants when federal terrorism acts allow the satisfaction of claims through blocked assets.

In the end, the U.S. Congress passed the Victims of Trafficking and Violence Protection Act of 2000, "which permitted certain victims of terrorist acts to collect 100% of their compensatory damages from the United States government."[120] In regard to *Flatow*, the plaintiffs were still allowed to execute garnishments in collection of his punitive damages award via the Victims of Trafficking and Violence Protection Act of 2000.[121]

This is exemplified in the present case where, should Caballero collect the full amount of the Wells Fargo blocked assets, the *Pescatore* and *Stansell* judgment holders will be left to look elsewhere to satisfy their judgments. They would be left with nothing of the limited pool of frozen assets from Rosenthal's businesses. Instead of allowing this "race to the courthouse" style of proceeding, Congress would have to take legislative measures to change the inter-judgment creditor competition. Congress may attempt to create a fund to pay for the claims of victims of terrorism in a similar method to the Victims of Trafficking and Violence Protection Act where the U.S. government

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[116] *Id.* at 16–17.
[117] *Id.* at 16.
[118] *Id.*
[119] *Id.*
[120] *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1069 n. 6 (9th Cir. 2002).
[121] *Id.* at 1075.

satisfied claims. This may foster fairer conclusions to judgment creditor races.

Ultimately, in the South Dakota Garnishment Action, the court denied the fellow judgment creditor's attempt to intervene because the judgment creditors failed to show an injury in fact for standing purposes.[122] The *Stansell* and *Pescatore* judgment creditors are still able to execute garnishment proceedings against other agencies and instrumentalities of FARC.

Regarding Caballero's garnishment action and Banco Continental's foreign proceeding, Antonio Caballero claims that the first-to-file rule applies because his South Dakota Garnishment Action was filed prior to Banco Continental's foreign bankruptcy proceeding.[123] Citing *In re Rohalmin,* Caballero argues that their South Dakota action was filed first and actions in the Southern District of Florida should be transferred to South Dakota out of comity and the similarity of the issues presented in each case.[124] In that case, the trustee claimed the "Dealership Defendants" had transferred their dealership operations to new parties in order to avoid FLSA and tax liabilities.[125] Some of the defendants claimed there was a pending case in Virginia with largely the same parties and issues that was an appropriate and first-filed case.[126] Quoting *First Equitable Realty, III, Ltd. v. Dickson,* the defendants argued that "[w]here two actions involving overlapping issues and parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule."[127] "Moreover, the Eleventh Circuit requires that the party objecting to jurisdiction in the first-filed forum carry the burden of establishing "compelling circumstances" to warrant an exception to the first-filed

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[122] Order Denying Motion to Intervene, *Caballero v. Fuerzas Armadas Revolucionarias de Columbia,* No. 4:19-cv-04011-KES, (D.S.D. Jan. 18, 2019), ECF 23, at 18.

[123] Motion to Transfer, *supra* note 16, at 13 (citing *Dilworth* (sic), 598 B.R. at 904 (likely citing *In re Rohalmin*, 598 B.R. at 905)).

[124] *Motion to Transfer, supra* note 16, at 13.

[125] *In re Rohalmin*, 598 B.R. at 902–03.

[126] *Id.* at 903.

[127] *Id.* at 905.

rule.[128] That court did in fact transfer the case to the Eastern District of Virginia.[129]

Banco de los Trabajadores, in their response to Antionio Caballero's Motion to Transfer, claim the first to file rule does not apply at all.[130] Bantrab cites a Southern District of Florida opinion explaining the application of the first-filed rule, which considers "(1) the chronology of the two actions, (2) the similarity of the parties, and (3) the similarity of the issues."[131] Bantrab argues the first-filed rule makes no sense in the bankruptcy context.[132] In that case, the plaintiffs, Lori Laskaris and Daniel Laskaris, filed a putative class action against Fifth Third Bank alleging usury claims and breach of contract. In the same case, another group of plaintiffs, the *Klopfenstein* et al. plaintiffs, had filed a case in the Northern District of Ohio over six months prior.[133] *Klopfenstein v. Fifth Third Bank* had been transferred to the Southern District of Ohio as the most convenient venue.[134] Ultimately, the Southern District of Florida dismissed and transferred the *Laskaris* case to the Southern District of Ohio as the first-filed court, which allows the first-filed court to decide "[w]hether or not both cases should proceed independently" or not.[135]

Laskaris v. Fifth Third Bank did not deal with plaintiffs that claimed rights to assets that were also assets claimed in the course of a bankruptcy proceeding where a liquidating trustee sought rights to the assets for their orderly distribution. The United States approach to bankruptcy allows for the orderly distribution of assets, which is in direct conflict with the race-to-the-courthouse style of garnishment action that is present in the U.S. antiterrorism judgment and collection efforts.

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[128] *Id.*
[129] *Id.* at 907.
[130] *See* Memorandum in Opposition to Antonio Caballero's Motion to Transfer, *In re Banco Continental*, No. 20-10917-RAM (S.D. Fla. Bankr. Oct. 23, 2020), ECF No. 28 at 6–7 [hereinafter *Memo. in Opposition*].
[131] *Laskaris v. Fifth Third Bank,* 962 F. Supp. 2d 1297, 1299 (S.D. Fla. 2013).
[132] *Memo. in Opposition, supra* note 131, at 6.
[133] *Laskaris,* 962 F. Supp. 2d at 1298.
[134] *Id.*
[135] *Id.* at 1299.

II. THE UNITED STATES APPROACH TO BANKRUPTCY AND THE AUTOMATIC STAY

The United States added chapter 15 to the Bankruptcy Code with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[136] Chapter 15 is the U.S. domestic adoption of the Model Law on Cross-Border Insolvency created by the United Nations Commission on International Trade Law. Chapter 15 replaces section 304 of the Bankruptcy Code.[137] The purpose of chapter 15 is to "provide effective mechanisms for dealing with insolvency cases involving debtors, assets, claimants, and other parties of interest involving more than one country."[138] The primary objectives of chapter 15 include:

> (1) "cooperation between United States courts, the United States Trustee, and United States debtors on the one hand, and the courts and other competent authorities of foreign countries on the other hand; (2) greater legal certainty for trade and investment; (3) fair and efficient administration of cross-border insolvencies; (4) preserving and maximizing the value of the foreign debtor's assets; and (5) facilitating the rescue of financially troubled businesses.[139]

Chapter 15 further provides:

> "The bankruptcy court may, at the request of the foreign representative, grant provisional relief pending entry of an order granting the petition for recognition such as: (1) staying execution against the debtor's assets located in this country; (2) allowing the foreign representative to administer assets located in

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[136] *Ancillary and Other Cross-Border Cases*, *supra* note 28.
[137] *Chapter 15 Administration,* U.S. DEP'T OF JUSTICE at 1, https://www.justice.gov/ust/file/volume_6_chapter_15_case_administration.pdf/download (last visited Feb. 2, 2021) (from the United States Trustee Program Policy and Manual).
[138] *Ancillary and Other Cross-Border Cases*, *supra* note 28.
[139] *Chapter 15 Administration*, *supra* note 138, at 1.

> this country; (3) providing for the examination of witnesses or the gathering of evidence regarding the debtor's assets, affairs, rights, obligations, or liabilities; or (4) suspending or allowing the avoidance of certain transfers.[140]

Regarding number (4), the provisional relief must be "urgently needed to protect the debtor's assets or the interest of creditors."[141] Chapter 15 has a mandatory recognition rule where the bankruptcy court must, after notice and a hearing, enter an order recognizing the foreign proceeding if the foreign proceeding and the foreign representative meet chapter 15's definitional requirements and the filing requirements provided for in 11 U.S.C. § 1515 are satisfied.[142] A bankruptcy court may refuse to recognize a foreign proceeding if recognition would be "manifestly contrary to U.S. public policy.[143] As stated earlier, a key bankruptcy provision is the automatic stay that applies to property of the debtor located in the United States, and prohibits actions against the debtor's property.[144] The automatic stay applies once the bankruptcy court enters an order granting recognition of the of the proceeding.[145] The automatic stay stops the South Dakota Garnishment Action initiated by Antonio Caballero and protects the Banco Continental frozen assets should they be deemed property of the bankruptcy estate.[146]

In the case this note is based on, Banco Continental, after being accused of supporting drug trafficking, was ordered to undergo "forced liquidation" by the National Banks and Securities Commission ("CNBS") of Honduras.[147] Bantrab was declared the liquidating trustee for Banco Continental.[148] Grupo Continental, the parent organization

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[140] 11 U.S.C. § 1519.
[141] *See Chapter 15 Administration*, *supra* note 138, at 1.
[142] *Id.* at 2.
[143] *Id.*
[144] 11 U.S.C. § 1520.
[145] *Chapter 15 Administration*, *supra* note 138, at 2.
[146] *See id.*
[147] Michael Lohmuller, *Honduras Closes Bank as Elite Money Laundering Case Hits Savers,* Insight Crime (Oct. 13, 2015), https://www.insightcrime.org/news/brief/honduras-closes-bank-as-elite-money-laundering-case-hits-savers/.
[148] *Motion for Recognition*, *supra* note 26, at 1.

of Banco Continental, claimed that a "forced liquidation would 'impede' Grupo Continental . . . from being able to pay its outstanding invoices and its more than 11,000 employees[.]"[149] Grupo Continental claimed this would not occur with a voluntary liquidation.[150]

The prior history of the case is important in understanding how and why the chapter 15 foreign bankruptcy proceeding was initiated. Banco Continental held over fourteen (14) million dollars of assets in the United States, and these assets were ordered blocked "[p]ursuant to regulations promulgated by the Office of Foreign Assets Control" ("OFAC") and the Foreign Narcotics Kingpin Regulations and held by Wells Fargo.[151] The Rosenthal Family were found to have supported terrorist organizations such as FARC, the National Liberation Army, the Norte del Valle Cartel, among others by money laundering and other services in support of international narcotics trafficking.[152] The asset blocking designation recognizes that the Government of Honduras initiated liquidation proceedings against Banco Continental, and that Banco Continental was under the control of the Honduras Government and a government-appointed liquidator.[153] The OFAC Designation Article also notes that "a transaction to liquidate or wind down Banco Continental S.A. involves a U.S. person, including a U.S. financial institution, or is within the jurisdiction of the United States, that transaction would be prohibited unless authorized by OFAC."[154] Thus, Wells Fargo was prohibited from relinquishing the funds from their control without OFAC authorization.

Wells Fargo then filed an interpleader action in the United States District Court for the Southern District of Florida to adjudicate

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[149] *Honduras Orders "Forced Liquidation" of Bank Accused of Money Laundering* LATIN AM. HERALD TRIB., http://www.laht.com/article.asp?ArticleId=2397990&CategoryId=23558 (last visited Feb. 5, 2021).
[150] *Id.*
[151] Wells Fargo Bank, N.A.'s Motion for an Injunction Under 28 U.S.C. § 2361 And Incorporated Memorandum of Law, *Wells Fargo v. Caballero*, No. 20-cv-20868-CMA (S.D. Fla. Nov. 20, 2020), ECF No. 35 at 2.
[152] *See Motion to Transfer, supra* note 16, at 2.
[153] Office of Foreign Assets Control, *Statement on Proposed Liquidation of Banco Continental,* U.S. DEP'T OF THE TREAS. (Oct. 11, 2015), https://home.treasury.gov/system/files/126/banco_continental_10112015.pdf.
[154] *Id.*

who had rights to these funds.[155] As the Wells Fargo Interpleader Action notes, in late 2015, Bantrab, as liquidating trustee of Banco Continental, received an OFAC license to wind down Banco Continental's assets, but the license did not allow for the unblocking of property blocked pursuant to Foreign Narcotics Kingpin sanctions.[156]

As the South Dakota garnishment action was winding down, Banco Continental was forced to file a Petition for Recognition in the Bankruptcy Court for the Southern District of Florida under 11 U.S.C. § 1517. Bantrab realized they were late to the party and losing the "race to the courthouse," and by filing the foreign bankruptcy proceeding, Bantrab sought the protection of the automatic stay while they sought other venues for collecting the frozen assets.[157] Thus, the garnishment action in South Dakota could not be completed due to the injunction thwarting actions against the property of Banco Continental, assuming the property was still Banco Continental's and therefore property under the control of the liquidating trustee, Bantrab. With the "recognition of a foreign main proceeding, actions against the debtor and its property are stayed, transfers outside the ordinary course of business must be approved by the court recognizing the foreign proceeding, and parties holding assets of the debtor may be subject to turnover orders. . . ."[158]

A. Which Law Supersedes?

The question remains, which law supersedes and dictates the distribution of Banco Continental's funds controlled by Wells Fargo? The United States has significant interests in protecting international bankruptcy proceedings as they respect comity with other nations in the turnover of assets rightfully controlled by entities of those nations. In the present case, the Government of Honduras seeks the turnover

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[155] *Wells Fargo Bank, N.A. v. Caballero*, 20-cv-20868-CMA (S.D. Fla. Nov. 20, 2020).
[156] *Motion to Transfer*, *supra* note 16, at 5 (citing OFAC licenses from ECF 13 at 104–112 explaining the licenses did not authorize the "unblocking of any property blocked pursuant to the Foreign Narcotics Kingpin Sanctions Regulations, 31 CFR part 598.").
[157] *See* 11 U.S.C. § 362.
[158] *In re British Am. Ins. Co.,* 488 B.R. 205, 212-213 (Bankr. S.D. Fla. 2013).

of the Banco Continental assets in order to satisfy Banco Continental creditors that may not have been involved in the Rosenthal money laundering organization. At the same time, the United States has a significant interest in protecting judgment holders who have been the victims of international terrorist acts. The latter has been an ongoing dedicated policy matter of Congress for decades. In reviewing the ATS's original enactment in 1789, Congress has attempted to give victims of terrorism and other torts the ability to hold those accountable for centuries.

Bankruptcy cases are filed to thwart the actions of aggressive creditors who aim to fully collect on what is owed to them at the expense of other creditors. Caballero's garnishment action is the exact type of action the automatic stay provision is meant to halt. Bantrab must file a foreign proceeding in order to carry out their duties as liquidating trustee of Banco Continental's assets.

B. Case Outcomes

There are many conclusions that can be reached in the immediate case. The judgment creditors can split the Banco Continental assets in a settlement. Banco Continental was the original asset holder, and, as liquidating trustee, Bantrab takes over the mantle of holder of the frozen assets. The three respective judgment creditors all have a right to assets that belong to an agent or instrumentality of FARC. This would likely be the fairest outcome where those that have been wronged by FARC are able to, in a shared manner, recover a small portion of their greater default judgments as well as Banco Continental's creditors obtaining a portion of the blocked assets in satisfaction of their claims.

When a U.S. bankruptcy court "recognizes a foreign main proceeding under chapter 15, section 1520(a)(1) of the Bankruptcy Code provides that actions against the foreign debtor or 'property of the debtor that is within the territorial jurisdiction of the United States' are" subject to the automatic stay.[159] A "foreign main proceeding" is a

[159] *Chapter 15 Recognition Mandatory and Fully Encumbered Assets Are "Property of the Debtor" Protected by Automatic Stay,* JONES DAY PUBL'NS, https://www.jonesday.com/en/insights/2013/11/chapter-15-recognition-mandatory-and-fully-encumbered-assets-are-property-of-the-debtor-protected-by-automatic-stay#:~:text=If%20a%2

proceeding pending in a country where the debtor's "center of main interests" are located, whereas a "foreign non-main proceeding is a proceeding in a country where the debtor has an establishment, but not its 'center of main interests.'"[160] The proceeding of *In re Banco Continental* would be considered a foreign main proceeding because the liquidation of Banco Continental is being carried out in Honduras, which is the principal place of business for Banco Continental.[161] Thus, the pending proceeding Bantrab has filed in the Southern District of Florida is located where the "center of main interests" for Banco Continental is located.

The question then becomes are the Wells Fargo accounts still the property of Banco Continental and are they subject to the automatic stay? The Department of the Treasury answers this question by stating that the assets are merely blocked or "frozen" and that these terms are merely connoting "a way of controlling targeted property."[162] Ultimately, the title of the frozen property is still with the target of the OFAC sanctions.[163] "Blocking immediately imposes an across-the-board prohibition against transfers or dealings of any kind with regard to the property."[164]

The court could lift the automatic stay pursuant to section 362(d) of the Bankruptcy Code. This is a long shot because the court would have to find "cause" to lift the stay, which is typically a good faith filing balancing test involved in single-asset real estate cases.[165] This is a high bar and one not likely met in the present case.

Eventually, the parties reached a private settlement. OFAC delisted the five organizations, including Banco Continental, that were a part of the Rosenthal Money Laundering Organization from their Foreign Narcotics Kingpin Designation Act designation dating back to

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0U.S.%20bankruptcy%20court,section%20362%E2%80%95the%20Bankruptcy%20Code's%20%E2%80%9C (last visited Feb 6, 2021).

[160] *Ancillary and Other Cross-Border Cases*, *supra* note 28.

[161] *Motion for Recognition, supra* note 26, at 1.

[162] *OFAC FAQ*, *supra* note 93 (answered in Frequently Asked Question number 9).

[163] *Id.*

[164] *Id.*

[165] *In re Phoenix Piccadilly, Ltd.,* 849 F.2d 1393, 1394 (11th Cir. 1988).

October 2015.[166] The United States Department of the Treasury found that "[f]ollowing OFAC's designation, Honduran authorities seized or took control over multiple entities and properties owned by the Rosenthal [Money Laundering Organization]."[167] The Treasury further explains that the "delisting serves as a successful example of the ultimate goal of the Administration's use of sanctions as a tool – to bring about a positive change in behavior."[168]

This delisting of the money laundering organizations signifies that "all property and interests in property, which had been blocked solely as a result of these designations, are unblocked and all otherwise lawful transactions involving U.S. persons and these entities and individuals are no longer prohibited."[169] As stated earlier, this delisting does not retroactively affect the disposition of the South Dakota Garnishment Action, but with the complicated litigation that would follow, a settlement comes as no surprise. The parties came together and negotiated a split to the assets, which was approved by the courts and parties involved.[170] Issue 3 of the "Strategic Plan for Federal Judiciary" is titled "The Effective and Efficient Management of Public Resources."[171] This settlement furthers the policy encouraging the efficient use of judicial resources by honoring an out of court settlement all parties freely enter into and providing an expedient and seemingly fair ending to an interesting ordeal.

III. CONCLUSION

It is apparent that the United States' laws providing for the attachment of blocked assets linked to terrorism creates a "race to the courthouse" that favors a few creditors. Congress was briefed on the

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[166] Press Release, *Treasury Delists Former Honduran Money Launderer and Associated Companies*, U.S. DEP'T OF THE TREAS. (Aug. 25, 2020), https://home.treasury.gov/news/press-releases/sm1106.
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] Order, *Wells Fargo v. Caballero*, No. 20-cv-20868-CMA (S.D. Fla. Nov. 20, 2020), ECF No. 139 at 2.
[171] *Issue 3: The Effective and Efficient Management of Public Resources*, ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/statistics-reports/issue-3-effective-and-efficient-management-public-resources, (last visited Feb. 5, 2020).

matter in congressional hearings and were satisfied with that process for holding terrorism-linked entities accountable. However, it is unclear what alternatives to the "race to the courthouse" are available. The terrorism victims' garnishment actions serve Congress's goal of punishing those who would aid terrorist activities.

Unfortunately, the settlement deems many of the intriguing questions moot. But in law this is often the case until another, similar case hits a federal docket. Bankruptcy lends itself to out of court settlements, and in the name of judicial economy is the preferred outcome.[172] Moreover, collecting against terrorist parties is a difficult proposition, whether locating funds or being the first to attach them. For terrorism judgment creditors, even small victories are still victories.

[172] *See e.g., United States v. Hartog*, 597 B.R. 673, 680 (S.D. Fla. 2019).